

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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PLR-123595-09
Date:
September 28, 2010

TYs:

Legend

Taxpayer =
Foreign Trust A =
Foreign Trust B =

Trustee 1 =
FC1 =
FC2 =
FC3 =
Year 1 =
Year 2 =
Year 3 =
Year 4 =
Date 1 =
Date 2 =
Country X =
Accountant A =
Accountant B =
Accounting Firm C =
Law Firm D =
Y =

Dear :

This is in response to a letter dated April 20, 2009, submitted by your authorized

representative, that requests the consent of the Commissioner of the Internal Revenue Service (“Commissioner”) for Taxpayer to make a retroactive qualified electing fund (“QEF”) election under section 1295(b) of the Internal Revenue Code (“Code”) and Treas. Reg. § 1.1295-3(f) with respect to Taxpayer’s investment in FC2.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

FACTS

Taxpayer has been and continues to be a resident alien within the meaning of Code section 7701(b)(1)(A)(i) and, therefore, a U.S. person under Code section 7701(a)(30). Taxpayer is a named beneficiary in Foreign Trust A which was established by Taxpayer’s father, a non-U.S. person.

Until Date 1, Foreign Trust A was a foreign grantor trust for U.S. tax purposes, treated as owned by Taxpayer’s father pursuant to Code section 677 and Treas. Reg. § 1.672(f)-3(b)(3). On Date 1, Foreign Trust A became a foreign non-grantor trust. At all times since its formation, Foreign Trust A has been administered and managed by trustees that have been non-U.S. persons. Trustee 1 is the current trustee of Foreign Trust A.

Foreign Trust A is a beneficiary of a one-fifth separate share of Foreign Trust B. Foreign Trust B indirectly owns 100 percent of the stock of FC1, a corporation organized under the laws of Country X. FC1 owned a Y percent interest in FC2, a corporation organized under the laws of Country X, until Date 2 when FC2 was merged into a related entity, FC3. As a result of its business activities, FC2 had been a passive foreign investment company (“PFIC”) under Code section 1297 until it merged into FC3 on Date 2.

Both Trustee 1 and prior trustees of Foreign Trust A have, under their obligations to Foreign Trust A, refused to disclose to Taxpayer information concerning the structure through which Foreign Trust A holds assets and Foreign Trust A’s trust documentation. The statements and forms Taxpayer received from Trust A and Trust B did not indicate that the trusts held shares in FC2 or that FC2 was a PFIC for U.S. federal income tax purposes (and of the consequences of such investment).

During the period Year 1-Year 2, Taxpayer did not receive beneficiary statements from the trusts and did not file income tax returns because she did not otherwise

have taxable income. During the period Year 3-Year 4, Taxpayer relied upon the advice of qualified tax professionals including Accountant A, Accountant B, and Accounting Firm C. However, because Taxpayer was unaware of the existence of FC2 and was not provided with sufficient information from the trustees of Trust A to determine FC2's existence, the tax professionals were unaware of the existence of FC2 and were unable to determine that Taxpayer indirectly owned shares in a PFIC.

In Year 4, Taxpayer engaged Law Firm D to assist her in certain estate planning issues, including with respect to her interests in Trust A and Trust B. During the course of its representation of Taxpayer, Law Firm D discovered that Taxpayer indirectly owned shares in FC2 and, thus, indirectly owned shares in a PFIC.

Taxpayer has submitted an affidavit, signed and under penalties of perjury, describing the events that led to the failure to make the QEF election by the election due date, including the role of the trustee, accountants, and law firm. Taxpayer has also submitted affidavits of Trustee 1, Accountant A, Accountant B, Accounting Firm C, and Law Firm D corroborating the representations made by Taxpayer.

Taxpayer represents that, as of the date of this request for ruling, the PFIC status of FC2 has not been raised by the IRS on audit for any of the taxable years at issue.

RULING REQUESTED

Taxpayer requests the consent of the Commissioner to make a retroactive QEF election with respect to FC2 for Year 1 under Treas. Reg. § 1.1295-3(f).

LAW

Code section 1295(a) provides that a PFIC will be treated as a QEF with respect to a taxpayer if (1) an election by the taxpayer under Code section 1295(b) applies to such PFIC for the taxable year and (2) the PFIC complies with such requirements as the Secretary may prescribe for purposes of determining the ordinary earnings and net capital gains of such company.

Under Code section 1295(b)(2), a QEF election may be made for any taxable year at any time on or before the due date (determined with regard to extensions) for filing the return for such taxable year. To the extent provided in regulations, such an election may be made after such due date if the taxpayer failed to make an election by the due date because the taxpayer reasonably believed the company was not a PFIC.

Under Treas. Reg. § 1.1295-3(f), a shareholder may request the consent of the

Commissioner to make a retroactive QEF for a taxable year if:

1. the shareholder reasonably relied on a qualified tax professional, within the meaning of Treas. Reg. § 1.1295-3(f)(2);
2. granting consent will not prejudice the interests of the United States government, as provided in Treas. Reg. § 1.1295-3(f)(3);
3. the request is made before a representative of the Internal Revenue Service raises upon audit the PFIC status of the corporation for any taxable year of the shareholder; and
4. the shareholder satisfies the procedural requirements of Treas. Reg. § 1.1295-3(f)(4).

The procedural requirements include filing a request for consent to make a retroactive election with, and submitting a user fee to, the Office of the Associate Chief Counsel (International). Treas. Reg. § 1.1295-3(f)(4)(i). Additionally, affidavits signed under penalties of perjury must be submitted that describe:

1. the events that led to the failure to make a QEF election by the election due date;
2. the discovery of such failure;
3. the engagement and responsibilities of the qualified tax professional; and
4. the extent to which the shareholder relied on such professional.

Treas. Reg. §§ 1.1295-3(f)(4)(ii) and (iii).

CONCLUSION

Based on the information submitted and representations made with Taxpayer's ruling request, we conclude that Taxpayer has satisfied Treas. Reg. § 1.1295-3(f). Accordingly, consent is granted to Taxpayer to make a retroactive QEF election with respect to FC2 for Year 1, provided that Taxpayer complies with the rules under Treas. Reg. § 1.1295-3(g) regarding the time and manner for making the retroactive QEF election.

This private letter ruling is directed only to the taxpayer who requested it. Code section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this ruling must be attached to any tax return to which it is relevant.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to Taxpayer's first and second representatives.

Sincerely,

Jeffery G. Mitchell
Branch Chief, Branch 2
(International)

cc: